

Matter of Liberty Mut. Fire Ins. Co. v Testamar

2011 NY Slip Op 33095(U)

November 28, 2011

Sup Ct, NY County

Docket Number: 105066/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
BARBARA JAFFE

PART 5

Index Number : 105066/2011
LIBERTY MUTUAL FIRE INSURANCE
vs.
TESTAMAR, JEAN G.
SEQUENCE NUMBER : 001
COMPEL/STAY ARBITRATION
CA - 1486

_____ *stice* _____

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1	_____
234	_____
5	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

NOV 30 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/28/11
NOV 28 2011

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Matter of the Application of LIBERTY MUTUAL
FIRE INSURANCE COMPANY,

Index No. 105066/11

Motion Date: 9/13/11
Motion Seq. No.: 001

Petitioner,

-against

DECISION & JUDGMENT

For an Order Staying the Arbitration Demanded by

JEAN G. TESTAMAR,

Respondent,

-and-

FILED

NOV 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

JAY FRANCO SALAZAR, U-HAUL CO OF
ARIZONA, REPUBLIC WESTERN INSURANCE
COMPANY and GEICO GENERAL INSURANCE
COMPANY,

Proposed Additional Respondents.

-----X
BARBARA JAFFE, JSC:

For petitioner:

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For Salazar:

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By notice of petition and verified petition dated April 27, 2011, petitioner moves for an order permanently staying arbitration or, in the alternative, temporarily staying arbitration and

directing an immediate trial of factual issues, adding the proposed additional respondents, and declaring that Republic Western Insurance Company (Republic) and GEICO General Insurance Company (Geico) are responsible carriers for the vehicle at issue. Respondent Testamar and proposed respondents Salazar and Geico oppose.

I. BACKGROUND

On March 2, 2010, respondent Jean Testamar was involved in a motor vehicle accident with a vehicle driven by Jay Franco Salazar and owned by U-Haul Co. of Arizona (U-Haul). Petitioner insured Testamar's vehicle. (Petition, dated Apr. 27, 2011 [Pet.], Exh. B).

By letter dated February 11, 2011, a claim representative, allegedly employed by Republic, advised Testamar's attorney that it insured U-Haul and that its policy limits were "25/50/10." (*Id.*, Exh. C).

On or about April 6, 2011, Testamar served on petitioner a Request for Arbitration, in which she states that Salazar's vehicle was underinsured. (*Id.*, Exh. A).

On or about April 26, 2011, petitioner's review of Department of Motor Vehicle records revealed that a "Ramoncito" Salazar had registered two vehicles as insured by Geico; the address listed for Salazar is the same address reflected on the police accident report. (*Id.*, Exh. E).

By letter dated May 3, 2011, petitioner confirmed that its policy limits for Testamar were \$100,000 per person or \$300,000 per occurrence. (Affirmation of Olga L. Nikishin, Esq., dated May 10, 2011 [Nikishin Aff.], Exh. F).

II. CONTENTIONS

Petitioner alleges that there is insufficient evidence showing that Salazar's vehicle was underinsured given evidence that the vehicle and Salazar were insured by Republic and/or Geico.

(Pet.).

Testamar contends that Republic's policy limits are \$25,000 per person and \$50,000 per accident, that it offers no excess or umbrella coverage, and that Republic has offered to settle her claim against U-Haul for \$25,000. Testamar thus contends that as U-Haul's policy limits are less than those provided by petitioner, she should be permitted to proceed to underinsured arbitration. In the alternative, she asks that the proposed additional respondents be added to the action and directed to specify their policy limits and defenses. (Nikishin Aff.).

Salazar argues that his vehicle was insured by Republic at the time of the accident, and that as Republic's policy limits are lower than petitioner's limits, the petition should be denied. (Affirmation of Valerie Rivera, Esq., dated May 27, 2011).

Geico does not dispute that it insured Salazar on the accident date and observes that as Republic insured Salazar's vehicle and its policy limits were lower than petitioner's, petitioner's underinsured policy was triggered and Testamar was not required to exhaust Geico's policy limits prior to demanding underinsured arbitration. (Affirmation of Leopold Raic, Esq., dated July 13, 2011).

In reply, petitioner denies that it has been established, through admissible evidence, that Republic's policy limits are \$25,000/\$50,000 or that it tendered Testamar \$25,000 to settle her claim. It also alleges that Geico did not demonstrate that it need not provide any insurance coverage here absent a copy of Geico's insurance policy. (Reply Affirmation, dated Sept. 8, 2011).

III. ANALYSIS

A. Stay of arbitration

Pursuant to Insurance Law § 3420(f)(2), “an insured’s supplementary underinsured motorist coverage is triggered when the limit of the insured’s bodily injury liability coverage is greater than the same coverage in the tortfeasor’s policy.” (*Matter of Prudential Prop. & Cas. Co. v Szeli*, 83 NY2d 681 [1994]). Moreover, the applicable coverage limit for determining whether a tortfeasor is underinsured is the per accident bodily injury limit, not the per person limit. (*Id.*).

Although it is alleged that Republic’s policy limits are lower than petitioner’s, no party has submitted a copy of Republic’s policy nor any proof that Republic has tendered \$25,000 in settlement, and Geico has also failed to submit a copy of its policy. Thus, petitioner’s application is granted to the extent of temporarily staying arbitration between it and Testamar pending a framed issue hearing as to the proposed respondents’ insurance policy limits.

B. Joinder of proposed respondents

Absent any opposition, the proposed respondents are added to this proceeding.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the petition to stay arbitration is granted to the extent that a trial is directed of the preliminary issue as to coverage and the proposed respondents’ insurance policy limits, and the arbitration is stayed pending such trial; it is further

ORDERED, that the Clerk of the Trial Support Office (Room 158) is directed to assign this matter to an appropriate Part for trial upon receipt of a copy of this order with notice of entry,

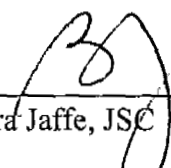
the filing of a note of issue and a statement of readiness, and the payment of appropriate fees, if any; it is further

ORDERED, that petitioner is directed to serve a copy of this order with notice of entry within 20 days of entry upon the attorneys for the respondent, the arbitrator, the County Clerk, and the Clerk of the Trial Support Office (Room 158); it is further

ORDERED, that petitioner is directed to serve a copy of this order with notice of entry, together with copies of all papers previously served in the proceeding, upon Jay Franco Salazar, U-Haul Co. of Arizona, Republic Western Insurance Company, and Geico General Insurance Company, who upon such service shall be added as party respondents; and it is further

ORDERED, that the caption of this proceeding is amended to reflect inclusion of said additional party respondents and the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), upon service by petitioner on each of them of a copy of this order with notice of entry, shall mark their records to reflect the amendment.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 28, 2011
New York, New York

NOV 29 2011

FILED

NOV 30 2011

NEW YORK
COUNTY CLERK'S OFFICE